Editor's note: Reconsideration denied by Order dated Nov. 12, 1986; Appealed, aff'd, No. 609-86L (Cl. Ct. Dec. 29, 1989), 19 Cl.Ct. 198

BENTON C. CAVIN

IBLA 85-89 Decided August 20, 1986

Application for award of fees and expenses under the Equal Access to Justice Act.

Denied.

1. Equal Access to Justice Act: Generally

   The apparent purpose of sec. 504(c)(1) is to give the court to which an agency action is appealed sole authority to hear and decide applications for fees and expenses for the costs of both judicial review and the underlying administrative proceeding.

2. Administrative Procedure: Administrative Procedure Act -- Equal Access to Justice Act: Generally

   A decision of this Board is an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. @ 554 (1982).

3. Equal Access to Justice Act: Generally

   By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

APPEARANCES: Benton C. Cavin, pro se; Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Benton C. Cavin has applied to this Board under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982), as amended by the Act of August 5, 1985, P.L. 99-80, 99 Stat. 183, 1/ for fees and expenses incurred in appealing to this Board three adverse decisions by the Bureau of Land Management (BLM).

1/ As originally enacted, the Equal Access to Justice Act, Act of Oct. 21, 1980, P.L. 96-481, Title II, 94 Stat. 2325, added section 504 to Title 5

Cavin originally applied to purchase 40 acres of land in 1976 under the Color of Title Act, 43 U.S.C. §§ 1068 through 1068b (1982). In its first decision, BLM rejected Cavin's application because it found the land had been withdrawn from entry prior to the date of the deed on which Cavin based his chain of title. On appeal, the Board set aside BLM's decision because it found that the land had not been withdrawn. Benton C. Cavin, 31 IBLA 145 (1977). In its second decision, BLM rejected Cavin's application based on a break it found in Cavin's chain of title. We set aside this decision because we found that BLM had misconstrued the requirements for establishing chain of title in color-of-title cases. Benton C. Cavin, 41 IBLA 268, 270 (1979). The third decision by BLM rejected Cavin's class 1 color-of-title application, approved his class 2 application, and established $183,000 as the amount due to obtain a patent to the land. 2/ We reversed the rejection of the class 1 application and found that Cavin was entitled to a patent. We also determined that, due to deficiencies in BLM's appraisal of the land, its report was to be disregarded and determined that, after reductions for equities, proper payment for the land was $7,390. Benton C. Cavin, 83 IBLA 107, 129 (1984).

Included in Cavin's application for fees and expenses was a request for an extension of time in which to file a supporting brief. The brief was duly filed which addressed the issue whether there had been an "adversary adjudication" within the meaning of the term in the EAJA so as to make Cavin an eligible applicant under the Act. Counsel for BLM filed an answer responding to applicant and advancing arguments against an award. Additional time was granted to Cavin to file a reply brief.

Initially, we note there is substantial doubt that this is the proper forum for the filing of the subject application. The regulations provide that an application under the EAJA must be filed with "the adjudicative officer." See 43 CFR 4.612. The regulations define the "adjudicative officer" as "the official who presided at the adversary adjudication." 43 CFR 4.602(c). Based on this, appellant has concluded that this Board was the "adjudicative officer." In point of fact, however, the initial adjudication in each of the appeals was conducted by the State Office, not the Board. Moreover, as the regulations clearly contemplate the taking of an appeal from the decision of

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fn. 1 (continued)
of the United States Code, amended in full 28 U.S.C. § 2412, and repealed Fed. R. Civ. P. 37(f). The initial Act provided that sections 504 and 2412(d) were repealed effective Oct. 1, 1984, except as to adversary adjudications and judicial actions initiated prior to that date. See sections 203(c), 204(c), 94 Stat. 2327, 2329. Subsequent to the repeal date, Congress extended and amended the Act. Act of Aug. 5, 1985, P.L. 99-80, 99 Stat. 183. This was done by reviving the repealed sections to be effective as of the date of the extension's enactment and by repealing the repeal provisions. Id.; § 6, 99 Stat. 186.

2/ See 43 CFR 2540.0-5(b), concerning class 1 and 2 color-of-title applications.

the adjudicative officer to the Board, 43 CFR 4.617 (an appeal which would be impossible if the Board were also expected to act as the adjudicative officer), it is clear that it was not contemplated that the Board would ever be deemed the adjudicative officer.

On the other hand, we recognize that there is some question whether the State Office could be the "adjudicative officer." The State Office does not have an adversary role in its adjudications, and there is technically no one representing the "Government" position. 3/ In any event, it is clear from the response on behalf of BLM that the State Office would deny the application. In similar situations, rather than remanding the matter to BLM for its initial review, the Board has accepted the matter to expedite ultimate decisionmaking. See Julie Adams, 45 IBLA 252 (1980). This approach is deemed appropriate in this case.

Four issues have been raised by the parties:

1. Whether there was an "administrative adjudication" within the meaning of the term as used in the EAJA.

2. Whether Departmental regulations permit fees and expenses to be awarded in the controversy between Cavin and BLM.

3. Whether attorney's fees may be awarded to a party who has appealed to this Board, pro se.

4. Whether this Board is barred from considering Cavin's application because he has announced his intent to appeal the amount he was required to pay for the patented land.

Because the last issue raises a question as to our jurisdiction over Cavin's application, we address it first.

[1] As added by the EAJA, section 504(c)(1), states in part that: "If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code." The referenced statute provides that in awarding fees and expenses to a prevailing party in an action for judicial review, "the court shall include in that award fees and other expenses to the same extent authorized in subsection [504](a) * * *." 28 U.S.C. § 2412(d)(3) (1982). The apparent purpose of the language quoted from section 504(c)(1), is to give the court to which an agency action is appealed sole authority to hear and decide applications for fees and expenses for both judicial review and the underlying administrative proceeding.

3/ Under section 504(b)(1)(C), an "adversary adjudication" requires an adjudication under section 554 "in which the position of the United States is represented by counsel or otherwise." This problem is independent of any question relating to whether the adjudication was pursuant to section 554 of the APA, a matter examined later in the text.

Counsel for BLM suggests that, because Cavin has announced in two letters written to the Department that he intends to seek judicial review of the portion of this Board's decision requiring payment of $7,390 as the value of the land to be patented, an award of fees and expenses would conflict with the EAJA (Answer at 12). In reply, Cavin states that he has not filed for judicial review, and he argues that the statutory provision applies only to restrain the granting of awards and does not preclude a determination as to eligibility (Reply at 37).

Although the full effect of section 504(c)(1) on decisions which are appealed in part by a succesful party is not clear, we need not consider the matter in the instant case. Cavin notes that as of the date of his reply brief, September 22, 1985, no judicial appeal had been filed. Nor have we been subsequently informed by either Cavin or BLM of the initiation of an appeal. Consequently, we find no basis to conclude that section 504(c)(1) precludes our consideration of Cavin's application.

We turn next to the chief issue on appeal, the scope of the EAJA. As amended, section 504(a)(1) of the EAJA provides in part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Of central importance to Cavin's application is whether an appeal to this Board is an "adversary adjudication." The EAJA defines this term in section 504(b)(1)(C), as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise * * *." Section 554 is part of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 through 559, 701 through 706 (1982), and by its terms applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554 (1982). The APA further defines an "adjudication" as the "agency process for the formulation of an order," 5 U.S.C. § 551(7) (1982), and defines an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing," 5 U.S.C. § 551(6) (1982).

[2] It is clear that a decision of this Board qualifies as an "order" as defined by the APA and, therefore, an appeal to the Board is an "adjudication" within the broad ambit of the APA. It does not follow, however, that such an appeal is necessarily an adjudication under section 554. That section applies only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554 (1982). As pointed out by counsel for BLM: "The Color of Title Act, 43 U.S.C. § 1068, pursuant to which appellant submitted his application for patent, does not contain any provision requiring an adjudication to be determined on the

record or provide for any type of agency hearing on an application" (Answer at 3). Similarly, the right to appeal to this Board from BLM decisions rendered under the public law laws is not a right provided by statute. See 43 CFR 4.1. Thus, neither BLM's reviews of Cavin's color-of-title application nor the decisions by this Board on his appeals constituted adjudications under section 554. Consequently, they were not "adversary adjudications" within the meaning of the EAJA. See Kaycee Bentonite Corp., 79 IBLA 182, 91 I.D. 138 (1984); In re Attorney's Fees Request of Madelon Blum, 9 IBIA 281, 89 I.D. 241 (1982).

In support of his application, however, Cavin argues that hearings compelled by reason of the due process clause of the Fifth Amendment are to be treated, for purposes of the APA, as "required by statute." In support, he cites Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), as well as two circuit court decisions, Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976), and Door v. Donaldson, 195 F.2d 764 (D.C. Cir. 1952). Cavin further argues that he held sufficient property interest in the land he applied for to have been entitled to due process protection under the Fifth Amendment and that the process which was due was a formal adjudicatory procedure. Thus, he concludes, the hearing to which he was entitled was equivalent to an adjudication under section 554 and was, therefore, an adversary adjudication under the EAJA, making him eligible to apply for fees and expenses.

Applicant's arguments raise numerous legal questions which have not been addressed by either this Department or the courts in the precise form presented by his application. In particular, the nature of the vested right held by a class 1 color-of-title applicant (see Benton C. Cavin, 83 IBLA at 130) and the applicability of the due process clause to protect this right have not been subject to judicial scrutiny. Assuming that a color-of-title applicant is entitled to due process protection, the extent of protection to which he is entitled has not been delineated, especially the nature of the hearing required and its constituent elements. See 2 Davis, Administrative Law Treatise §§ 10:1 through 10:6, 12:1 (2d ed. 1979); 4 Mezines, Stein & Graff, Administrative Law, § 32.01 (1985). Assuming further that due process requires hearings procedures equivalent to those provided by section 554, the question would remain whether such a hearing was an adjudication under section 554, see 2 Davis, Administrative Law Treatise, §§ 10:7 through 10:8 (2d ed. 1979), and, consequently, whether it was an adversary adjudication under the EAJA. See Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089 (7th Cir. 1984).

[3] We find no need to address this broad array of issues at this time. As required by the EAJA, 5 U.S.C. § 504(c)(1) (1982), the Department has promulgated regulations establishing procedures for submission and consideration of applications for fees and expenses. The controlling provision states:

These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by

> the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554.

43 CFR 4.603(a). For the purpose of the regulations, "adversary adjudication" is defined using the same terms as the EAJA. 43 CFR 4.602(b). However, as quoted above, the Department's regulations "do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." Thus, even if we were to conclude that a color-of-title applicant is entitled to a "trial type" hearing equivalent to that provided by section 554 by reason of the due process clause of the Fifth Amendment, we would be unable to find that the Department has provided a procedure for the submission and consideration of applications for the fees and expenses of such hearings. Rather, by its regulation "[t]he Department clearly intended to exclude from the coverage of the Act all proceedings except those required by a statute to be conducted under 5 U.S.C. § 554. In re Attorney's Fees Request of DNA -- People's Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (1983)." Kaycee Bentonite Corp., supra at 186-87. Accordingly, we find that Cavin is not an eligible applicant for fees and expenses incurred as a result of his controversy with the Department.

In his reply brief, Cavin argues that the applicability of the Department's regulations, as defined by 43 CFR 4.603(a), is narrower than the EAJA, and, therefore, the regulations are contrary to the intent of the EAJA. Specifically, he argues that in enacting the EAJA Congress was presumably aware of the judicial gloss on "required by statute" which he asserts had been established by the courts and that, in referring to section 554 in the EAJA, Congress intended the latter statute to have the same application (Reply at 16-17). As an alternative to declaring duly promulgated Departmental regulations invalid, Cavin further argues that we should interpret "required by statute" in 43 CFR 4.603(a) to include hearings required for constitutional due process reasons.

It is impossible to interpret the regulation in the manner appellant suggests. Interpretation of a statute or a regulation is required only when its language is found to be ambiguous. See 2A Sands, Sutherland Statutory Construction § 45.02 (4th ed. 1984). Reviewing the regulation, we note the words "required by statute" are used twice, both times in relation to hearings held under 5 U.S.C. § 554 (1982). In both instances we fail to find any ambiguity. Even assuming that the phrase is unclear, its meaning is settled by the next sentence which states that the rules do not apply to adjudications not required by statute even though the hearings procedures may be comparable to those required under section 554. Thus, appellant asks that we interpret one sentence of the regulation in a way that would totally negate the following sentence. This we cannot do.

As to Cavin's contention that the regulation is contrary to the EAJA, it must be pointed out that his argument is premised on a conclusion that Congress intended the EAJA to cover those hearings mandated by considerations of due process as well as those expressly required by statute. While this is a plausible theory, it is not the only possible one. Indeed, the regulation espouses, in effect, a more limited interpretation of congressional intent which is consistent with the actual language of the EAJA and also accords with the Supreme Court's recent pronouncements that waivers of immunity from claims for attorney's fees and costs are to be strictly construed. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S. Ct. 3274, 3278 (1983); Library of Congress v. Shaw, 54 U.S.L.W. 4951 (U.S., July 1, 1986). While this Board may be vested with authority to declare a regulation contrary to the authorizing statute, such a determination may be made only where the conflict is demonstrable. See George E. Krier, 92 IBLA 101, 103-106 (1986). No such showing has been made. Accordingly, we must reject Cavin's application under the EAJA as it is not in accord with the implementing regulations. In light of this conclusion, we need not discuss the subsidiary points raised by his petition.

We note that Cavin had requested time to submit documentation of his fees and expenses. Because we have determined that he is not eligible under Departmental regulations, there is no need to grant this request. Similarly, counsel for BLM has requested leave to separately address the issue of whether the underlying proceedings were substantially justified as that term is used in the EAJA. Because of our holding, there is no need to grant this request.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the application for fees and expenses is dismissed.

James L. Burski
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Will A. Irwin
Administrative Judge